

# AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW

JAN KLABBERS



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## Introduction

### Introduction

Whatever activity one wishes to engage in at the beginning of the twenty-first century, be it the sending of a postcard to a friend abroad or the purchase of a television set produced in a foreign country, it is more than likely that the activity is in one way or another regulated by the activities of an international governmental organization. Indeed, there are few, if any, activities these days which have an international element but which are not the subject of activities of at least one (and quite often more than one) international organization. International organizations have developed into a pervasive phenomenon, and according to most calculations even outnumber states.<sup>1</sup>

Wherever human activity is organized, there will be rules of law, as expressed in the ancient adage *ubi societas, ibi ius*. Social organization without rules is, quite literally, unthinkable. Hence, the activities of international organizations are also subject to law, and give rise to law. Each and every international organization has a set of rules relating to its own functioning, however rudimentary such a set of rules may be. Moreover, as international organizations do not exist in a vacuum, their activities are also bound to exercise some influence on other legal systems, and absorb the influence of such systems. While it is by no means impossible for international organizations to be influenced by, and exert influence on, the law of individual nation-states (the law of the European Community is an excellent

<sup>1</sup> Brownlie's estimate of 170 organizations appears somewhat conservative. See Ian Brownlie, *Principles of Public International Law* (4th edn, Oxford, 1990), p. 680. Others, such as Peter Bekker, mention a figure of some 350. See his *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of their Legal Status and Immunities* (Dordrecht, 1994), p. 4. Possibly speaking from the top of his head, Jeremy Carver went so far as to suggest the figure of 7,000. See his intervention at the Taipei meeting of the International Law Association's Committee on Accountability of International Organisations, in ILA, *Report of the Sixty-eighth Conference* (London, 1998), p. 614.



example), the more direct and influential links usually exist with the body of rules known as international law. Not surprisingly, therefore, international lawyers have attempted to describe and analyse these links and the resulting rules, and the legal concepts which make them possible to begin with.

This book will try to provide a comprehensive introduction to the law of international organizations, and aims to do so above all by concentrating on general legal issues. Thus, there will be little discussion of individual organizations, and fairly little presentation of decontextualized facts. Instead, the aim is to discuss legal problems relating to the creation, the functioning and the termination of international organizations.<sup>2</sup>

### **An introductory textbook on institutional law**

The very fact that this textbook is intended to be introductory has several implications. The most obvious one will be a lack of detail, but existing works, such as the encyclopedic volume by Schermers & Blokker, offer more than adequate compensation.<sup>3</sup> In addition, there are numerous specialized works on various individual international organizations. In recent years, the United Nations in particular has been the subject of various rich and detailed studies,<sup>4</sup> as have numerous other organizations.

This is a textbook about the law of international organizations, and that almost by definition entails that its focus will rest upon the institutional law rather than on substantive law. After all, the most likely area where general rules and principles may develop is where international organizations have things in common. Generally speaking, they will have things in common when it comes to the way they are organized, rather than with respect to their substantive rules.<sup>5</sup>

<sup>2</sup> In its organization, this book owes much to C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge, 1996).

<sup>3</sup> H. G. Schermers & Niels Blokker, *International Institutional Law* (3rd edn, The Hague, 1995).

<sup>4</sup> See, e.g., Bengt Broms, *United Nations* (Helsinki, 1990), or Benedetto Conforti, *The Law and Practice of the United Nations* (The Hague, 1997). Most insightful, without being 'legalistic', is Thomas M. Franck, *Nation Against Nation: What Happened to the UN Dream and What the US Can Do about it* (Oxford, 1985).

<sup>5</sup> Although here too comparative work may be beneficial. One can readily think, e.g., of a study comparing the debate on free trade and environmental concerns in a multitude of organizations, such as the EU, the WTO, the OECD and the less well-known International Tropical Timber Organization.

Moreover, it would be absolutely impractical to devote attention to the substantive law of any organization, let alone the various substantive laws of a host of organizations. Indeed, with respect to some organizations, writers already divide their works into substantive and institutional studies.<sup>6</sup> Having said that, though, it should be pointed out that there is no firm line dividing the institutional from the substantive; references to substantive legal rules (legal philosopher H. L. A. Hart would speak of primary rules<sup>7</sup>) will be in abundance, but not as a goal in themselves. Rather, they will serve to explain and elucidate institutional issues.

Although meant as a textbook for university students, practitioners too may find this work of value, predominantly perhaps as a guide to understanding the often ambiguous legal precepts and in helping them to find further references.

For (it should scarcely warrant separate mention), a textbook's introductory character does not mean that further references and adequate footnoting can be dispensed with. Rather the opposite holds true: a proper introduction not only familiarizes the reader with the more important legal principles at stake, but also makes clear that few, if any, legal rules and principles are carved in stone. They are derived from precedent and research, and therefore it stands to reason that precedent and research be referred to. Indeed, especially where a more or less critical mode of analysis is thought to be of great educational value, as in this book, any slackening of the requirements of reference would expose intellectual dishonesty.

### Critical legal theory

As far as matters of theory go, the law of international organizations is still somewhat immature. We lack a convincing theory on the international legal personality of international organizations, to name just one thing. Moreover, if an international organization fails to meet its legal obligations, we are not at all sure as to whether and in what circumstances it can be held responsible, let alone whether its member states incur some responsibility as well. Furthermore, we are quick to point to the possibility that legal powers,

<sup>6</sup> Thus, T. C. Hartley's *The Foundations of European Community Law* (3rd edn, Oxford, 1994) discusses mainly the EC's institutional and administrative law, whereas Derrick Wyatt & Alan Dashwood, without ignoring institutional matters, have their focus largely on substantive Community law: *The Substantive Law of the EEC* (3rd edn, London, 1993).

<sup>7</sup> H. L. A. Hart, *The Concept of Law* (Oxford, 1961).

while not explicitly granted to a given organization, may nonetheless be implied, but we are less certain as to the basis of such implied powers. In short, on numerous points, the law lacks certainty, and to the extent that certainty is apparent, it is usually the relatively indeterminate sort of certainty that ‘problems are best solved by negotiations’, or that ‘an equitable solution is called for’.

Such problems stem, ultimately, from the lack of a convincing theoretical framework regarding international organizations,<sup>8</sup> and it is surprising to note that, while international organizations have been with us for roughly a century and a half, few attempts have been made at theorizing.<sup>9</sup> In particular, international legal doctrine has a hard time coming to terms with the relationship between an international organization and the very states which are its members.

While the optimist may hold that such uncertainties may decrease over time, as science progresses, recent theoretical work in the field of law generally, and international law in particular, suggests that such optimism may well be misguided. One of the core propositions of the critical legal studies movement is, rather, that law is doomed to go back and forth between two extremes. On the one hand (if we limit ourselves to international law), the law is supposed to respect the interests of individual states. As any introductory textbook on international law will make clear, international law is largely based on the consent of states; and they have given this consent as free and individual sovereign entities. Thus, the law must cater to their demands, or it runs the risk of losing the respect of precisely those whose behaviour it is supposed to regulate.

Yet, at the same time, the law must also take the interests of the international community into account, in two distinct but related ways. First, as those individual states are not isolated, but are in constant touch with one another, it may well be that the sovereign activities of one interfere with the sovereign prerogatives of the other. Perhaps the classic example is that

<sup>8</sup> See generally also Jan Klabbers, ‘The Changing Image of International Organizations’, in Jean-Marc Coicaud & Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo, 2001), 221–55.

<sup>9</sup> An early example is A. Rapisardi-Mirabelli, ‘Théorie générale des unions internationales’ (1925/II) 7 RdC, 345–93. Amongst more recent attempts, see in particular David Kennedy, ‘The Move to Institutions’ (1987) 8 *Cardozo Law Review*, 841–988, and Deirdre Curtin & Ige F. Dekker, ‘The EU as a “Layered” International Organization: Institutional Unity in Disguise’, in Paul Craig & Gráinne de Búrca (eds.), *The Evolution of EU Law* (Oxford, 1999), 83–136.

of pollution caused in one state which wanders across the border into the other.<sup>10</sup> To a large extent, problems of extraterritorial jurisdiction have the same origin: a clash of sovereigns.

Secondly, and it is here in particular that international organizations come in, some interests override those of individual states. While arguably two states can agree on mutually limiting their respective industrial activities with an eye to each other's environment, such an agreement only acquires meaning if it is embedded in a wider normative framework. Put more simply, such an agreement will be deemed to bind both states by virtue of general international law. And to make matters a lot more concrete, it is easy to conceive of both their activities contributing to environmental degradation, while realizing that the consequences of such degradation will not remain limited to the two states of the example.

The two extremes sketched above have been the two poles that have dominated theories about (and of) international law such as they have developed, and it has long been a frustration that if a theory managed to explain a lot about sovereignty, it could not cope with considerations of community; and where it could cope with community, it was invariably at the expense of considerations of sovereignty.<sup>11</sup>

It is the great merit of critical legal studies to have claimed that this tension between those two poles is, really, unsolvable, at least given our normative apparatus which does not allow us to make normative choices.<sup>12</sup> Under the paradigm of liberalism, it is impossible to give priority to some values over other values. Indeed, the 'liberal' value *par excellence*, tolerance, is itself eminently empty. She who is tolerant of others is she who refuses to make normative choices.

Unavoidably, this affects international law. Following the critical legal tradition, international law is bound to swerve back and forth between the two poles of sovereignty and community, and never the twain shall meet.

<sup>10</sup> Compare the classic *Trail Smelter* arbitration between the US and Canada, awards of 16 April 1938 and 11 March 1941, partly reproduced in 9 AD 315 and fully reported in III UNRIIA 1905.

<sup>11</sup> The very existence of such tension was explicitly noted in one of the seminal texts on the law of international organizations, Michel Virally's 'La notion de fonction dans la théorie de l'organisation internationale', in Suzanne Bastid *et al.*, *Mélanges offerts à Charles Rousseau: la communauté internationale* (Paris, 1974), 277–300, esp. p. 296.

<sup>12</sup> Classic works are David Kennedy, *International Legal Structures* (Baden Baden, 1987), and Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, 1989).

It is this tension which makes international legal rules often (if not always) ultimately uncertain, and it is this tension that will function as the red thread running through this book.

For, if the critical problem affects international law, and indeed affects other legal systems as well (the notion was first developed by American lawyers, with reference to US law<sup>13</sup>), it will also affect the law of international organizations. Indeed, above, I already mentioned, amongst other things, the tension between the implied powers doctrine on the one hand, and the principle that organizations and their organs can only act on the basis of powers conferred upon them (the so-called principle of attribution of powers, or principle of speciality) on the other hand. This tension can be seen as the tension between sovereignty and community in a different guise. Strict adherents to the notion of state sovereignty will not easily admit the existence of an implied power;<sup>14</sup> yet for the protection of community interests, an implied power may well be deemed desirable. Thus, the tension between the two strands of thinking is visible in some of the more general and central notions of the law of international organizations.

It is the great merit of critical legal studies to have illuminated the unsolvable nature of the tension between thinking in terms of state sovereignty and thinking in terms of the community interest. That is not to say, however, that the effects of the tension cannot be mitigated: they often can.<sup>15</sup> Critical legal studies is, after all is said and done, interested primarily in stating absolutes, and the way to do so is by juxtaposing extremes.<sup>16</sup> In practice, however, there may be some decent breathing room between two extremes.

Put differently, there is sufficient reason to believe that while critical theory may be right in the abstract, in everyday life the fact that no right answer is available does not immediately make legal analysis meaningless. Often, there is room for some form of compromise; often, there is room

<sup>13</sup> See, e.g., Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, MA, 1986).

<sup>14</sup> In a telling choice of words, implied powers have even been regarded as fundamental violations of national sovereignty. See Moshe Kaniel, *The Exclusive Treaty-making Power of the European Community up to the Period of the Single European Act* (The Hague, 1996), p. 101.

<sup>15</sup> Compare also Jan Klabbbers, *The Concept of Treaty in International Law* (The Hague, 1996).

<sup>16</sup> This is why some authors are dismissive of critical legal studies, positing that the movement is too extreme. See, e.g., Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton, 1990). The same argument (in nutshell-version) can be found in Ronald Dworkin, *Law's Empire* (London, 1986), pp. 271–5.

to discover some principle of more or less general application. Still, that takes nothing away from the usefulness of the critical method. Indeed, in contrast to more traditional approaches, it does not lure the reader into thinking that the law has any certainties to offer.<sup>17</sup>

Thus, the red thread running through this book will be a critical analysis of the law of international organizations, in order to show the problems involved in that area of international law. Nonetheless, that is where the theoretical focus will stop. My aim is not to provide a critical deconstruction of the law of international organizations;<sup>18</sup> rather, it is to provide an introductory look at international organizations from a critical perspective. Precisely because the main benefit of critical legal theory is its capacity to make visible the inherent tensions and contradictions which help shape the law, it can provide great services to an introductory textbook.<sup>19</sup>

### Trying to define international organizations

Perhaps the most difficult question to answer is the one which is, in some ways, a preliminary question: what exactly is an international organization? What is that creature that will be central to this book? The short answer is, quite simply, that we do not know. We may, in most cases,<sup>20</sup> be able to recognize an international organization when we see one, but it has so far appeared impossible to actually define such organizations in a comprehensive way.<sup>21</sup>

What is only rarely realized is that it is indeed structurally impossible to define, in a comprehensive manner, something which is a social creation to begin with. International organizations are not creatures of nature, which

<sup>17</sup> Incidentally, this type of analysis is not limited to critical lawyers only. See, e.g., the way in which Franck uses the notion of fairness as a means to reconcile the tensions noted above: Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford, 1995), esp. ch. 1.

<sup>18</sup> With respect to EC law, such an exercise has been undertaken by Ian Ward, *The Margins of European Law* (London, 1996).

<sup>19</sup> See, in a similar vein, Veijo Heiskanen, *International Legal Topics* (Helsinki, 1992).

<sup>20</sup> There have been some doubts recently about, e.g., the European Union and the OSCE; more traditionally, GATT's status as an international organization has been debated, which has led some scholars to the question-begging conclusion that if it was not a de jure organization, it was at least a de facto organization.

<sup>21</sup> Compare generally also Abdullah El-Erian, 'Preliminary Report on the Second Part of the Topic of Relations between States and International Organizations' (1977/II, pt 1), YbILC 139–55.

lead a relatively intransmutable existence, so that all possible variations can be captured within a single definition. Instead, they are social constructs,<sup>22</sup> created by people in order, presumably, to help them achieve some purpose, whatever that purpose may be.

It is important to realize, indeed, that international actors do not purposely set out to create an international organization following some eternally valid blueprint. Instead, their aim will be to create an entity that allows them to meet their ends, endow those entities with some of the characteristics they think those entities might need (certain organs, certain powers), and then hope that their creation can do what they set it up for. They do not meet and decide to create, say, a 'functional open organization'. That may well be what their creation will eventually look like, but will normally not be their intention. Labels such as 'functional open organization' are labels conceived by scholars, for the sole purpose of classifying organizations, in the hope that classification will contribute to our understanding. As far as the international actors themselves are concerned, they are probably not overly interested in such issues.

That said, it is common in the literature to delimit international organizations in at least some ways. One delimitation often made depends on the nature of the body of law governing the activities of the organization. If those activities are governed by international law, we speak of an international organization proper, or at least of an intergovernmental organization. If those activities are, however, governed by some domestic law, we usually say that the organization in question is a non-governmental organization; examples include such entities as Greenpeace or Amnesty International. While the activities of such entities may be international in character, and they may even have been given some tasks under international law,<sup>23</sup> they do not meet the usual understanding of what constitutes an international organization.

For the international lawyer, it goes without saying that the activities of those organizations that are subject to international law will be of most interest. Usually, those organizations will have a number of characteristics in common although, in conformity with the fact that their founding fathers are relatively free to establish whatever they wish, those characteristics are

<sup>22</sup> In much the same way as notions such as state sovereignty are socially construed. Compare, e.g., Thomas J. Biersteker & Cynthia Weber (eds.), *State Sovereignty as Social Construct* (Cambridge, 1996).

<sup>23</sup> Compare, e.g., the role of the Red Cross under the 1949 Geneva Conventions.

not more than characteristics. The fact that they do not always hold true does not, as such, deny their value in general.

... created between states ...

One of those characteristics is that international organizations are usually created between states,<sup>24</sup> or rather, as states themselves are abstractions, by duly authorized representatives of states.<sup>25</sup> This, however, does not tell the whole story. For one thing, there are international organizations which are themselves members of another international organization, and sometimes even founding members. The EC, thus, is a member of the FAO, and a founding member of the WTO. Still, we do not exclude the WTO and the FAO from the scope of international organizations simply because they count another organization among their members. Generally, then, it is not a hard and fast rule that international organizations can only be created by states.<sup>26</sup>

Secondly, not all creatures created by states are generally considered international organizations.<sup>27</sup> States may, e.g., establish a legal person under some domestic legal system. Perhaps an example is the Basle-Mulhouse airport authority, a joint venture, if you will, between France and Switzerland and governed by French law.<sup>28</sup>

<sup>24</sup> This implies a minimum of two; an example of such a small organization was (is?) the Office Franco-Allemand pour la Jeunesse, defendant in *Klarsfeld v. Office Franco-Allemand pour la Jeunesse* before the Paris Court of Appeal, 18 June 1968. See 72 ILR 191.

<sup>25</sup> As the Permanent Court of International Justice already held in 1923, states can only act by and through their agents: *Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, advisory opinion, [1923] Publ. PCIJ, Series B, no. 6, at 22. Which agents (of which agencies) are concerned is a different matter altogether. In 1962, Lord Strang could observe, somewhat awestruck, that, within the British government, some twenty departments bore responsibility for maintaining relations with international organizations. See Lord Strang, *The Diplomatic Career* (London, 1962), p. 107.

<sup>26</sup> There is at least one international organization which is created exclusively by other organizations: the Joint Vienna Institute (essentially established, in 1994, to help eastern European states in their transition to market-based economies, text in (1994) 33 ILM 1505). This was the creation of the BIS, EBRD, IBRD, IMF and OECD. A curious example of a different nature (an organization created not so much by, as in order to aid, a different organization) is the Advisory Centre on WTO Law, which aims to assist developing nations in their dealings with the WTO. For a brief overview, see Claudia Orozco, 'The WTO Solution: The Advisory Centre on WTO Law' (2001) 4 *Journal of World Intellectual Property*, 245–9.

<sup>27</sup> Conversely, sometimes non-governmental organizations may be regarded as intergovernmental for some purposes. See, with respect to IATA, the Swiss Federal Tribunal's decision in *Jenni and others v. Conseil d'Etat of the Canton of Geneva*, 4 October 1978, in 75 ILR 99.

<sup>28</sup> On such creatures generally see the several-volume work by H. T. Adam, *Les organismes internationaux spécialisés* (Paris). See generally also Ignaz Seidl-Hohenveldern, *Corporations in and under International Law* (Cambridge, 1987).



Moreover, sometimes treaties are to be implemented with the help of one or more organs. For instance, the European Court of Human Rights is entrusted with supervising the implementation of the European Convention on Human Rights. Yet, the Court is not considered to be an international organization in its own right; it is, instead, often referred to as a treaty organ.

In what exactly the distinction between an organization and a treaty organ resides is unclear, and perhaps it may be argued that its importance is diminishing at any rate: scholars writing in the field of, e.g., environmental law, have more or less started to unite the two forms of cooperation, and use the rather more generic term of 'international institutions', as encompassing both treaty organs and international organizations.<sup>29</sup> Others have pointed out that treaty organs endowed with decision-making powers may well be international organizations in disguise,<sup>30</sup> and, in the political science literature, reference is often made to 'international regimes'<sup>31</sup> or, again, 'institutions'.<sup>32</sup>

*... on the basis of a treaty...*

A second characteristic many organizations (but again, not all) have in common is that they are established by means of a treaty. Their creation was not brought about by some legal act under some domestic legal system, but was done in the form of a treaty, which international law in general terms defines as a written agreement, governed by international law.<sup>33</sup> And as the treaty will be governed by international law, so too will the organization.

<sup>29</sup> See, e.g., Alan E. Boyle, 'Saving the World? Implementation and Enforcement of International Environmental Law through International Institutions' (1991) 3 *Journal of Environmental Law*, 229–45. See also Robin R. Churchill & Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000), 94 *AJIL*, 623–59.

<sup>30</sup> So, e.g., Deirdre Curtin, 'EU Police Cooperation and Human Rights Protection: Building the Trellis and Training the Vine', in Ami Barav *et al.*, *Scritti in onore di Giuseppe Federico Mancini, volume II* (Milan, 1998), 227–56. Curtin refers to such bodies as 'unidentified international organizations'.

<sup>31</sup> See, e.g., Stephen D. Krasner (ed.), *International Regimes* (Ithaca, 1983).

<sup>32</sup> See Daniel Wincott, 'Political Theory, Law and European Union', in Jo Shaw & Gillian More (eds.), *New Legal Dynamics of European Union* (Oxford, 1995), 293–311. Note also that some recent creations self-consciously style themselves not as organizations, but rather as informal groups or networks, despite having all the characteristics of organizations. Examples include the International Network for Bamboo and Rattan (INBAR) and the International Jute Study Group. For an intelligent exploration of the concept of network, see Annelise Riles, *The Network Inside Out* (Ann Arbor, 2000).

<sup>33</sup> Thus article 2(1) (a) of the 1969 Vienna Convention on the Law of Treaties. See generally Klabbers, *Concept of Treaty*.

Not all organizations derive directly from a treaty, though. Some have been created not by treaty, but by the legal act of an already existing organization. The United Nations General Assembly, for instance, has created several organizations by resolution: the United Nations Industrial Development Organization (UNIDO)<sup>34</sup> and the United Nations Children's Fund (UNICEF) come to mind, as do various institutions set up by the Nordic Council, including financial institutions such as the Nordic Investment Bank.<sup>35</sup> Indeed, the Nordic Council itself originated as a form of cooperation between the parliaments of the five states concerned (Denmark, Finland, Iceland, Norway and Sweden), rather than being clearly treaty-based.<sup>36</sup> The importance of this characteristic, then, is above all to indicate that the creation of an international organization is an intentional act. Organizations rest upon conscious decisions of the states involved; they do not come out of the blue, and are not created by accident.

That said, a discernible recent tendency is to remain nebulous about intentions when creating international institutions. In recent years, organizations such as the Organization for Security and Co-operation in Europe (OSCE),<sup>37</sup> Asia-Pacific Economic Co-operation (APEC),<sup>38</sup> the Arctic Council<sup>39</sup> and the Wassenaar Arrangement<sup>40</sup> have been established, but

<sup>34</sup> UNIDO was first set up as an organ of the General Assembly and was supposed to function as an 'autonomous organization' within the UN. Only later did it become a separate organization. See Schermers & Blokker, *International Institutional Law*, p. 26.

<sup>35</sup> Another example is the creation, in 1955, of the European Civil Aviation Conference (ECAC) by ICAO at the behest of the Council of Europe. For more details, see <http://www.ecac-ceac.org/uk> (visited 18 December 2001).

<sup>36</sup> See generally Frantz Wendt, *The Nordic Council and Co-operation in Scandinavia* (Copenhagen, 1959).

<sup>37</sup> See Christine Bertrand, 'La nature juridique de l'Organisation pour la Sécurité et de la Coopération en Europe (OSCE)' (1998) 98 RGDIP, 365–406; Ignaz Seidl-Hohenveldern, 'Internationale Organisationen aufgrund von soft law', in Ulrich Beyerlin *et al.* (eds.), *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt* (Berlin, 1995), 229–39. The OSCE's website proudly proclaims that OSCE is not an organization in the classic sense of the term, and that its instruments are devoid of legal force but nonetheless highly authoritative. Still, the OSCE has recently started to reconsider its status, in particular after finding out that privileges and immunities might be required to facilitate its activities. See Permanent Council Decision 383 of 26 November 2000, available at <http://www.osce.org/docs/english/pc/2000/decision/pcdec383.htm> (visited 18 December 2001).

<sup>38</sup> See Melissa Castan, 'APEC: International Institution? A Pacific Solution' (1996) 15 *University of Tasmania Law Review*, 52–76.

<sup>39</sup> See generally Timo Koivurova, 'The Legal Status of Arctic Cooperation', in Lassi Heininen & Gunnar Lassinantti (eds.), *Security in the European North: From 'Hard' to 'Soft'* (Rovaniemi, 1999), 143–60.

<sup>40</sup> See Christoph Hoelscher & Hans-Michael Wolfgang, 'The Wassenaar-Arrangement Between International Trade, Non-proliferation, and Export Controls' (1998/1) 32 *JWT*, 45–63.

with all of them it remains unclear whether they indeed are to be regarded as full-blown organizations rather than, say, frameworks for occasional diplomacy, and even whether their constituent agreements constitute treaties or not. The legal status and structure of the European Union have, likewise, been subject to debate,<sup>41</sup> and the G-7 (or G-8; the confusion is telling in itself) defies any attempt at definition and classification.<sup>42</sup>

... *an organ with a distinct will*...

In order to distinguish the international organization from other forms of international cooperation, another often-mentioned characteristic holds that the organization must possess at least one organ which has a will distinct from the will of its member states. Where the collectivity merely expresses the aggregate opinion of its members, giving it the legal form of an international organization would, in the extreme, be a useless act. One might as well have appointed a spokesperson.<sup>43</sup>

Important though the characteristic of a 'distinct will' is, it is also the most difficult in terms of both practice and theory. As several authorities have noted, in practice not all organizations usually referred to as international organizations possess this characteristic.<sup>44</sup> In theoretical terms, the characteristic of the distinct will goes to the heart of the entire concept of international organization: the problematic relationship between the organization and its member states.

In one way, the international organization is little more than the tool in the hands of the member states, and, viewed from this perspective, the distinct will of the organization is little more than a legal fiction.<sup>45</sup> Yet, the international organization, in order to justify its *raison d'être* and its

<sup>41</sup> See, e.g., Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 CMLRev, 17–69.

<sup>42</sup> See generally Jan Klabbbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 Nordic JIL, 403–21.

<sup>43</sup> Nonetheless, the position that organizations are little more than standing international conferences comes close. For an example, see G. R. Berridge, *Diplomacy: Theory and Practice* (London, 1995). Similarly state-centric is Gaetano Arangio-Ruiz, 'The "Federal Analogy" and UN Charter Interpretation: A Crucial Issue' (1997) 8 EJIL, 1–28.

<sup>44</sup> Compare Schermers & Blokker, *International Institutional Law*, p. 30, making the curious move that therefore, it is a requirement of a legal character that organizations have a will of their own, by which they seem to mean that for all practical purposes the requirement is irrelevant.

<sup>45</sup> Compare Reinhold Reuterswärd, 'The Legal Nature of International Organizations' (1980) 49 Nordisk TIR, 14–30.

somewhat special status in international law, must insist on having such a distinct will. For, otherwise, it becomes indistinguishable from other forms of cooperation, and, if so, it will become extremely difficult to justify why, for example, the constituent treaties of organizations warrant teleological interpretation, as is so often claimed, or why such constituent treaties appear to possess far greater possibilities for deriving implied clauses (in the form of implied powers) from them than regular treaties are said to do.

These are problems that will be dealt with properly later on, and which might ultimately defy any easy solution. For the moment, it is important to realize that the '*volonté distincte*' of international organizations is often mentioned as their quintessential characteristic, but is itself not an unproblematic concept.

### **The lay-out of this book**

It is slightly problematic to find a decent way of structuring a study which is not limited to a single legal system. When studying a single legal system, one can always ask oneself what that system's sources are, what its subjects are, what its rules say and how it copes with disputes; with a book such as the present, however, comparing various legal subsystems and placing them within the larger framework of international law, those questions offer but limited guidance.

Therefore, it is perhaps wiser simply to apply the more or less chronological method, and follow international organizations from their creation through to their possible demise, and deal with a variety of questions that may arise along the way. It is this idea (borrowed from Amerasinghe) that guides the succession of chapters in this book, although the reader should realize that the idea itself is an abstraction, which does not necessarily do full and complete justice to real life.

Thus, I will discuss the creation of international organizations as legal entities, examine the links between the law of international organizations and general rules of international law (in particular the law of treaties), discuss issues of membership and financing, outline the legal rules relating to privileges and immunities, discuss the adoption of legal acts by the organization as well as what to do when those legal acts may give rise to doubts, debate the external activities of international organizations and issues of responsibility under international law, and will conclude by examining the possible dissolution of international organizations.

I will not, however, engage in comparative research or description: such has been done brilliantly by Schermers & Blokker, and it is not my ambition to try and improve on their seminal work. Instead, my aim is to study general problems organizations have in common and the range of possible solutions, and to analyse why so few of the solutions can be offered with any great amount of confidence or certainty.

In doing so, two international organizations will often be singled out for illustrative purposes: the United Nations, and the European Community. The reason for the choice of the United Nations will be obvious: it is the single most important existing international organization, aiming to provide peace and security for the whole of mankind. Moreover, and a bit more to the point, in many respects the activities of the UN have served, and continue to serve, as models for other organizations. To name but one example: the privileges and immunities of many international organizations are modelled upon those of the UN.

The choice of the European Communities requires perhaps some explanation, especially in light of the fact that many writers think the EC is so unique that it warrants separate treatment: what may hold good for international organizations, generally, may not hold good for the EC.<sup>46</sup> Yet, precisely because of its unique features, the EC may serve as a blueprint or a source of inspiration for possible future developments. For, if the phenomenon of international organization is to develop, it is not unlikely that future organizations will to some extent take the EC as a model and, perhaps, learn from its mistakes. Moreover, while acknowledging that the EC is an organization *sui generis* that in many respects cannot be compared to other organizations, it is, nevertheless, still an international organization,<sup>47</sup> at least to the international lawyer.<sup>48</sup>

<sup>46</sup> Thus, Amerasinghe, *Principles*, is practically silent on the EC, as is a monograph such as Tetsuo Sato, *Evolving Constitutions of International Organizations* (The Hague, 1996).

<sup>47</sup> And arguably losing some of its *sui generis* qualities and therewith becoming more like a 'regular' organization. See briefly Jan Klabbers, 'On Babies, Bathwater, and the Three Musketeers, or the Beginning of the End of European Integration', in Veijo Heiskanen & Kati Kulovesi (eds.), *Function and Future of European Law* (Helsinki, 1999), 275–81.

<sup>48</sup> It is one of the brilliant curiosities of the EC that we can all project our own professional identities onto it. Many constitutional lawyers are wont to see the EC as a sort of constitution beyond the nation-state; for private lawyers, it has above all to do with the free movement of goods, services, capital and workers, and competition law, and is thus predominantly a form of organizing a market across frontiers. For the international lawyer, it is an international organization: it may be an organization *sui generis*, as is often argued, but an organization it still is.

A book such as the present cannot just plunge into the thick of things. Before actually starting, some points of a more general nature must be made. These include a short historical survey of the rise of organizations generally, but also some considerations of a more theoretical nature. After all, although we may often forget it, in a world which has often been characterized by the fighting of all against all, and with two world wars still part of recent history, the very existence of international organizations, and their apparent success, demands an explanation.

Moreover, not just the very existence and success of international organizations has been subjected to various explanations, but so too has the operation of international law in respect of international organizations. In other words: why does the law say what it says? Are there explanations for the particular contents of rules of law, and, if so, are such explanations convincing? In a general sense, these questions underlie much of this book, rendering it what one might call (if somewhat tongue in cheek perhaps) a textbook with an attitude. The next chapter, however, will look at such questions from a somewhat wider perspective: focussing on general questions and explanations rather than specific ones.